

FILED

SEP - 8 2003

CLERK

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

\*\*\*\*\*

JAMES G. ABOUREZK,

Plaintiff,

vs.

PROBUSH.COM, INC., a Pennsylvania  
corporation,

Defendant.

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CIV. #03-4146

**SECOND AFFIDAVIT OF  
MICHAEL T. MARINO**

\*\*\*\*\*

STATE OF PENNSYLVANIA     )  
  :ss  
COUNTY OF MONTGOMERY     )

Michael Marino, being first duly sworn upon his oath, deposes and states:

1.

That I am providing this Affidavit in my official capacity as the President of ProBush.com, Inc. ("ProBush.com").

2.

That attached as Exhibit A to this affidavit is a true and correct copy of an e-mail that Todd D. Epp, representing himself as counsel for James G. Abourezk, sent to ProBush.com on April 10, 2003, which states that he discovered the website's "Traitor List<sup>TM</sup>" on April 9, 2003, and which specifically refers to the website's disclaimer.

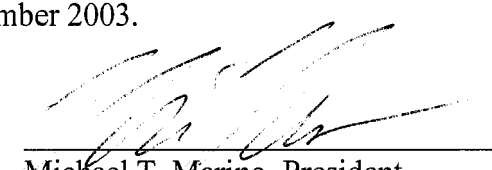
3.

That attached as Exhibit B to this affidavit is a true and correct copy of demand letter that Todd D. Epp, representing himself as counsel for James G. Abourezk, sent to ProBush.com on May 8, 2003, which states that he discovered the website's "Traitor List<sup>TM</sup>" on April 9, 2003 and which specifically refers to the disclaimer.

4.

Further your Affiant sayeth not.

Dated this 2 day of September 2003.

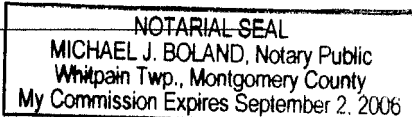
  
\_\_\_\_\_  
Michael T. Marino, President,  
ProBush.com, Inc.

Subscribed and sworn by me this 2 day of September, 2003.

  
\_\_\_\_\_  
Notary Public - State of Pennsylvania

My Commission expires:

(SEAL)



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of **Second Affidavit of Michael**

**T. Marino** was on this day sent via first class mail, postage prepaid, to the following:

Todd D. Epp  
Of Counsel  
Abourezk Law Offices, P.C.  
P.O. Box 1164  
Sioux Falls, SD 57101-1164

*Attorneys for the Plaintiff*

Dated this 8<sup>th</sup> day of September, 2003.



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Ronald A. Parsons, Jr.

----- Original Message -----

From: Todd D. Epp

To: TeamLeader@probush.com ; webmaster@probush.com ; tdepp@aol.com

Sent: Thursday, April 10, 2003 2:53 PM

Subject: Cease and desist in calling James G. Abourezk a traitor on your website

**CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

The information contained in this communication is intended only for the recipient. If you received this communication in error, please immediately notify Todd D. Epp at 605-334-8402, 866-258-2448, or tdepp@aol.com.

Re: Abourezk v. probush.com

Our file # 02-0013-02

Dear probush.com.

Please be advised that I represent former U.S. Senator James Abourezk. On or about April 9, 2003, he discovered that he was called a traitor on your website, probush.com. It is my legal opinion that such a statement is libelous under South Dakota law. SDCL 20-11-3 defines libel:

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

Mr. Abourezk is a veteran of the United States Navy, a former U.S. Congressman, and a former U.S. Senator. He is also admitted to practice law before the courts of South Dakota and the District of Columbia. In all of these roles, he has taken oaths to abide by and defend the Constitution of the United States of America. Further, particularly in this super-heated time of war, calling a person a traitor (one guilty of the crime of treason) not only subjects Mr. Abourezk to hatred, contempt and ridicule and to injury in his legal profession, it can also lead to physical harm.

Further, it is my analysis that this accusation is libelous per se. According to Sack on Defamation, §2.8.3.2 at 2-99 (3d ed. 1999) libel per se are "words. [that] tend on their face to disgrace the person about who they are written." Furthermore, treason is a felony under both federal law, 18 USCA § 2381, and South Dakota law, SDCL 22-8-1. Thus, to accuse Mr. Abourezk of treason is an extremely very serious accusation. You either know or should know that Mr. Abourezk is not a traitor and is not guilty of treason against his country.

In addition, in my legal opinion, the audio portion of your site calling those on it a traitor is slanderous.



Under SDCL 20-11-4:

Slander is a false and unprivileged publication, other than libel, which:

- (1) Charges any person with crime, or with having been indicted, convicted, or punished for crime;
- (2) Imputes to him the present existence of an infectious, contagious, or loathsome disease;
- (3) Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;
- (4) Imputes to him impotence or want of chastity; or
- (5) By natural consequence, causes actual damage.

This audio comment clearly brands Mr. Abourezk as a traitor, which noted above, is an accusation of the crime of treason. Again, according to Sack, § 2.82 at p. 2-93, this accusation is slander per se since you are accusing Mr. Abourezk of having committed a crime.

My client also realizes that you have attempted to place a "disclaimer" on the site. One cannot simply label defamatory statements a "parody" and then escape the consequences of the statements made. Further, your disclaimer is not prominent and can easily be missed by viewers of your website.

Thus, my client demands the following actions be taken immediately:

- . That any reference to Mr. Abourezk on your website be removed.
- . That you place an apology on your website. Such apology will be approved by Mr. Abourezk and shall be as prominent as your accusations against him are as of April 9, 2003. Such apology shall remain on your site for at least 30 days.
- . Payment of Mr. Abourezk's attorneys fees in the amount of \$2,000.00.

I have also notified Domains By Proxy, Inc., your registrar of this account, that you are in violation of your terms of service with them.

If you do not immediately take these actions, my client will sue you.

Contact me immediately or have your attorney contact me with your compliance to these demands.

Sincerely,

Todd D. Epp, Esq.

Of Counsel

Abourezk Law Offices, P.C.

PO Box 1164

Sioux Falls, SD 57101-1164

(o) 605.334.8402 (f) 605.334.9494

**Admitted in Kansas and South Dakota**

**ABOUREZK LAW OFFICES**  
A PROFESSIONAL CORPORATION

P. O. Box 1164

Sioux Falls, SD 57101-1164

TEL: (605) 334-8402

FAX: (605) 334-9404

georgepatton@pfire.net

James G. Abourezk  
(Also licensed in the  
District of Columbia)

Delivery Address:  
401 E. 8<sup>th</sup> Street #321  
Sioux Falls, SD 57103

Of Counsel:

Todd D. Epp  
(Also licensed in Kansas)

Sender's direct email: [tdepp@aol.com](mailto:tdepp@aol.com)

May 8, 2003

Office Manager  
Monica J. Johnson

Legal Assistant  
Gloria J. Hart

*Sent via Certified Mail, Return Receipt Requested*

Michael Marino  
ProBush.com, Inc.  
PO Box 16  
West Point, PA 19486

Re: Abourezk v. ProBush.com, Inc.  
Our file # 02-0013-02

Dear Mr. Marino:

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EXHIBIT

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5/8/2003

Page 2

treason is very serious indeed. You either know or should know that Mr. Abourezk is not a traitor and is not guilty of treason against his country. Though you have attempted to "disclaim" this defamation, it is my opinion that this attempted "disclaimer" is ineffective and meaningless.

Thus, my client demands the following actions be taken immediately:

- That you place an apology on your website to Mr. Abourezk. Such apology will be approved by Mr. Abourezk and shall be as prominent as your accusations against him are as of April 9, 2003.
- That any reference to Mr. Abourezk on your website be removed.
- Payment of Mr. Abourezk's attorneys fees in the amount of \$5,000.00.

I have also notified Domains By Proxy, Inc. your registrar of this account that you are in violation of your terms of service. They have already "given you up," and released your registration information to the public.

If you do not immediately take these actions, my client will sue you.

Contact me immediately with your compliance to these demands.

Sincerely,

TODD D. EPP LAW OFFICE, PLLC



Todd D. Epp

Cc: James G. Abourezk